FILED
JUN 11 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, [redacted] 1969

No. [redacted] 224

THEODORE J. GOTTHELF and TOBY GOTTHELF,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HARVEY M. SKLAVER
Attorney for Petitioners
777 Third Avenue
New York, N. Y. 10017

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting the Writ	5
Conclusion	8
Appendix A:	
Statutes Involved	1a
Appendix B:	
Opinion of the United States Court of Appeals for the Second Circuit	3a
Appendix C:	
Opinion of the Tax Court of the United States	10a
Appendix D:	
Judgment of the United States Court of Appeals for the Second Circuit	18a
Appendix E:	
Order Extending Time to File Petition for Rehearing	19a
Appendix F:	
Order Denying Petition for Rehearing	20a

Citations

PAGE

CASES:

Ben Ami v. *Ben Ami*, 8 N.Y.2d 885, affirming 9 A.D.2d 646 8

Commissioner v. *Bosch*, 387 U.S. 456 ..... 2, 7, 8

Commissioner v. *Lester*, 366 U.S. 299 ..... 2, 5, 6, 7, 8

Corliss v. *Bowers*, 281 U.S. 376 7

Helvering v. *Horst*, 311 U.S. 112 7

In re Brooklyn Trust Company, 163 Misc. [N.Y.] 117 8

Kendall v. *Kendall* (*Action No. 1*), 200 App. Div. [N.Y.] 702 8

Nichols v. *Nichols*, 306 N.Y. 490 ..... 7, 8

Orlick v. *Orlick*, 70 App. Div. [N.Y.] 592 8

Rehill v. *Rehill*, 306 N.Y. 126 8

Van Oss v. *Van Oss*, 377 F.2d 812 7

Weil v. *Commissioner*, 240 F.2d 497 7

STATUTES:

Internal Revenue Code of 1954:

Section 71(a) 2, 3, 5

Section 71(b) 2, 3, 5, 6, 8

Section 215 ..... 2, 3

Internal Revenue Code of 1939:

Section 22(k) 6

IN THE

Supreme Court of the United States

October Term, 1968

No.

THEODORE J. GOTTHELF and TOBY GOTTHELF,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Harvey M. Sklaver, on behalf of Theodore J. Gotthelf and Toby Gotthelf, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit (Appendix B, *infra*, pp. 3a-9a) is reported at 407 F.2d 491, 23 AFTR2d 69-549. The opinion of the Tax Court of the United States (Appendix C, *infra*, pp. 10a-17a) is reported at 48 T.C. 690.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 28, 1969 (Appendix D, *infra*, p. 18a). By order of that Court dated March 4, 1969, the time within which Theodore J. Gotthelf and Toby Gotthelf might file a Petition for Rehearing was extended until March 7, 1969 (Appendix E, *infra*, p. 19a), and on March 13, 1969 the Petition for Rehearing was denied (Appendix F, *infra*, p. 20a). The jurisdiction of this court is invoked under 26 U.S.C. 7482(a) and 28 U.S.C. 1254.

Questions Presented

1. Whether section 71(b) of the Internal Revenue Code of 1954 prohibits any construction of ambiguous child support provisions in a separation agreement, with the result that payments under ambiguous provisions are *per se* not fixed for the support of minor children.

2. Whether, assuming the first question is answered in the negative,

a) the Courts below disregarded the clear meaning of *Commissioner* v. *Lester*, 366 U.S. 299, when they held that the separation agreement in issue fixed an amount for the support of minor children, even though the former wife was permitted to use all or a portion of that amount for her own benefit and enjoyment, or

b) the Courts below improperly failed to apply the New York rules of construction of separation agreements as required by *Commissioner* v. *Bosch*, 387 U.S. 456.

Statutes Involved

The pertinent statutes involved are sections 71(a), 71(b) and 215 of the Internal Revenue Code of 1954, and are printed in Appendix A, *infra*, pp. 1a-2a.

Statement

Sara and Theodore Gotthelf were married on July 20, 1951. During their marriage they had two children, Nicoll Beatrice Gotthelf, born on July 28, 1955, and Eric Van Gotthelf, born on October 24, 1956. On March 28, 1958, Sara and Theodore Gotthelf entered into a separation agreement and on April 3, 1958 they were divorced. The separation agreement was incorporated by reference in the divorce decree.

Pursuant to that separation agreement, during the year 1960, Theodore Gotthelf, the petitioner herein, made payments to his former wife in the amount of $11,400 and on his joint income tax return with his new wife deducted that amount as alimony pursuant to section 215 of the Code.[1] The former wife, Sara N. Gotthelf, included $4,400 in gross income as alimony under section 71(a) and excluded $7,000 as child support under section 71(b) of the Code.

The provisions of the separation agreement relating to the payments in issue are set forth in paragraph 5 thereof and read as follows:

> 5(a) In addition to the provisions heretofore made in Paragraph "4", the husband will hereafter pay to the wife, so long as she shall remain alive and does not remarry, the sum of Twelve Thousand ($12,000.00) Dollars annually as and for her support and for the support, care (including, but not by way of limitation, medical care and expenses), maintenance and education of the children of the marriage. Payment of the aforesaid sum shall be made in equal monthly installments of One Thousand ($1,000.00) Dollars each on the 1st day of each month in ad-

[1] On their joint return for 1960, Theodore and Toby Gotthelf deducted $12,000 which is the amount set forth in the separation agreement. It is conceded that they are not entitled to deduct any amount in excess of $11,400.

vance. Such monthly payments will be mailed to the wife at 462-41 Powell's Cove Boulevard, Beechhurst, Borough of Queens, City of New York, unless the husband is advised by the wife of a different mailing address.

(b) In the event that the parties become divorced, and that the wife thereafter remarries, then the amount which the husband shall pay the wife for the purposes stated in 5(a) of this agreement shall be reduced to the sum of Seven Thousand ($7,000.00) Dollars annually, to be paid in equal monthly instalments, subject to the further provisions of paragraph 5(c) of this agreement.

(c) When either child reaches the age of twenty-one years, or in the event of the death or marriage of either child before he or she becomes twenty-one years of age, or in the event that either child is no longer living under the care and supervision of the mother (*e.g.*, if either child is in the military forces), then the amount which the husband shall pay the wife shall be reduced by Thirty-five Hundred ($3,500.00) Dollars on an annual basis for each child, so that when both children reach the age of twenty-one years, or have died or have married before they reach the age of twenty-one years, or are no longer living under the care and supervision of the mother (*e.g.*, if in the military forces) (and in the event that the wife has not remarried), then the sole obligation of the husband will be to pay the wife the sum of Five Thousand Dollars ($5,000.00) annually, payable in equal monthly installments.

In addition to the provisions in the main portion of the agreement, there was attached a rider reading as follows:

"This agreement shall be binding on the Estate of the husband to the extent of the payment of Seven

> Thousand ($7,000.00) Dollars for the benefit of the two children, as in this agreement provided for."

The agreement was executed in New York where both parties and the children resided and where they continue to reside.

The Tax Court held that in the absence of the foregoing rider no part of the annual $12,000 payments would qualify as child support under section 71(b) since paragraph 5 did not "fix" or "specifically designate" an amount for the support of the children, *Commissioner* v. *Lester*, 366 U.S. 299 (1961). However, despite the fact that the rider was not to take effect until the husband's death and even then was subject to contingencies, the Tax Court held that the addition of the rider at the end of the agreement did fix or specifically designate an amount during the husband's lifetime. In view of its determination that section 71(b) applied to $7,000, the Tax Court denied the deduction for that amount which the husband claimed under section 215.

On review, the United States Court of Appeals for the Second Circuit affirmed. It viewed paragraph 5 of the agreement (*supra*, pp. 3-4) as being ambiguous and framed the issue before it as follows:

> "The question, therefore, is whether the addition of the rider clause cures the ambiguity or defect. We agree with the conclusion of the Tax Court that it does." (Appendix B, *infra*, at p. 8a.)

Reasons for Granting the Writ

1. In determining whether amounts paid by a husband to a wife pursuant to a separation agreement constitute alimony under section 71(a) of the Internal Revenue Code of 1954 or payments to support minor children under section 71(b), this Court stated on *Commissioner* v. *Lester*, 366 U. S. 299, 301:

> "* * * We have concluded that Congress intended that, to come within the exception portion of section 22(k) [of the Internal Revenue Code of 1939 which is section 71(b) of the Internal Revenue Code of 1954], the agreement providing for the periodic payments *must specifically state* the amounts or parts thereof allocable to the support of the children. * * *" (Emphasis supplied.)

This Court, in *Lester*, dealt with a separation agreement provision similar to paragraph 5 of the Gotthelf agreement in issue. This Court did not hold that the provision was ambiguous but only that it did not "fix" or "earmark" any amount for the sole use of the children.[2] It said that child support payments under section 71(b) of the Code must be " 'specifically designated' and not left to determination by inference or conjecture" (366 U.S. 299, 306) and thus established a *per se* rule. When the Court below held the provision to be ambiguous or defective it thereby precluded itself from construing the agreement.

2. The underlying issue in this case is whether the rider clause (*infra*, p. 5) could affect paragraph 5 of the separation agreement at a time that the husband was still alive. In this connection, the Court below stated (Appendix B, *infra*, p. 8a):

> "* * * Although clearer language in the agreement such as '$12,000 annually, consisting of $5,000 for her support and $7,000 for the support, care, maintenance and education of the children' would have been preferred, and would have saved the parties considerable litigation, the rider, in our opinion, achieves the same result."

Thus, the Court below reverted to the "sufficiently clear purpose" construction of section 71(b) which this Court rejected in *Lester*.

---

[2] It is worthy of note that in the case at bar the Tax Court recognized that absent the rider clause the annual $7,000 payments under paragraph 5 would not qualify as child support under section 71(b). (Appendix C, *infra*, at p. 15a).

The short answer to the Court below is that since the agreement was not written as the Court suggested, different rights attached. Under the language suggested by the Court below, the wife would have been required to use $7,000 solely for the benefit of the children and not for herself, but under the actual language of the agreement she could use all or any portion thereof for her own benefit (see the New York cases cited *infra*, pp. 7-8). Under the actual agreement the wife had complete enjoyment of the entire $12,000 and under basic precepts of the income tax law,

> " 'the income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as income, whether he sees fit to enjoy it or not.' *Corliss* v. *Bowers*, 281 U. S. 376, 378 (1930). Under the type of agreement here, the wife is free to spend the monies paid as she see's fit. 'The power to dispose of income is the equivalent of ownership of it.' *Helvering* v. *Horst*, 311 U. S. 112, 118 (1940)." (*Lester*, 366 U. S. 299, 303-304).

The logical progression of the holding by the Court below that the rider clause cured the ambiguity or defect existing in paragraph 5 of the agreement is that $7,000 a year was required to be used by the wife solely for child support, (*Weil* v. *Commissioner*, 240 F.2d 497, *Van Oss* v. *Commissioner*, 377 F.2d 812), a result contrary to the settled law of New York (see *infra*, pp. 7-8). In effect, the Court below was determining property rights from which federal tax consequences will flow. But, in determining those property rights the Court below omitted consideration of the New York law as expressed by the highest Court in that State, the Court below thereby disregarding this Court's requirement enunciated in *Commissioner* v. *Bosch*, 387 U. S. 456. If the Court below had applied the New York law as enunciated by the highest Court of the State, it would have concluded that the Gotthelf separation agreement, including the rider clause, did not require that any amount be used by the wife solely for the support of the children, *Nichols*

v. *Nichols*, 306 N.Y. 490 and *Rehill* v. *Rehill*, 306 N.Y. 126. Other New York cases related to the problem are *Orlick* v. *Orlick*, 70 App. Div. 592, *Ben Ami* v. *Ben Ami*, 8 N.Y.2d 885, aff'g 9 A.D.2d 646, *Kendall* v. *Kendall (Action No. 1)*, 200 App. Div. 702 and *In re Brooklyn Trust Company*, 163 Misc. 117.

Conclusion

The decision below is manifestly incorrect. Under the *Lester* analysis of section 71(b) the Court below was not permitted to construe the ambiguous agreement. However, even if construction is permitted the decision is erroneous under the basic precepts of the income tax law. Also, the Court below failed to apply the New York rules of construction under *Commissioner* v. *Bosch, supra,* and if it had done so, the Court below would have reached the conclusion that the agreement did not specifically designate any amount for the support of children. This Court may consider it appropriate, therefore, to grant certiorari and reverse the judgment without further briefs or argument.

Respectfully submitted,

HARVEY M. SKLAVER,
Attorney for Petitioners.

June 9, 1969

APPENDIX A

(Statutes Involved)

INTERNAL REVENUE CODE OF 1954:

SEC. 71. ALIMONY AND SEPARATE MAINTENANCE PAYMENTS.

(a) General Rule.—

(1) Decree of Divorce or Separate Maintenance.—If a wife is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such decree in discharge of (or attributable to property transferred, in trust or otherwise, in discharge of) a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation.

(2) Written Separation Agreement.—If a wife is separated from her husband and there is a written separation agreement executed after the date of the enactment of this title, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such agreement is executed which are made under such agreement and because of the marital or family relationship (or which are attributable to property transferred, in trust or otherwise, under such agreement and because of such relationship). * * *

(b) Payments to Support Minor Children—Subsection (a) shall not apply to that part of any payment which the terms of the decree, instrument, or

agreement fix, in terms of an amount of money or a part of the payment, as a sum which is payable for the support of minor children of the husband. For purposes of the preceding sentence, if any payment is less than the amount specified in the decree, instrument or agreement, then so much of such payment as does not exceed the sum payable for support shall be considered a payment for such support.

SEC. 215. ALIMONY, ETC., PAYMENTS.

(a) General Rule.—In the case of a husband described in section 71, there shall be allowed as a deduction amounts includible under section 71 in the gross income of his wife, payment of which is made within the husband's taxable year. * * *

APPENDIX B

(Opinion of United States Court of Appeals for the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 83-5—September Term, 1968.
(Argued October 15, 1968 Decided January 28, 1969.)

Docket Nos. 32363-5

Docket No. 32,363

Cal. No. 83

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

against

SARA N. GOTTHELF,

Respondent.

Docket Nos. 32,364-5

Cal. Nos. 84-5

THEODORE J. GOTTHELF and TOBY GOTTHELF,

Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Before:

WATERMAN and MOORE, *Circuit Judges;*
BONSAL,* *District Judge.*

---

* Of the Southern District of New York, sitting by designation.

Appendix B—Opinion of United States Court of Appeals for the Second Circuit

Appeal from a decision of the Tax Court, 48 T. C. No. 67, Arnold Raum, *Judge*, holding petitioners Theodore J. Gotthelf and Toby Gotthelf deficient in income tax due for the taxable year 1960, in the amount of $1,320.87. The Tax Court decision found that a separation agreement between Theodore and his former wife Sara Gotthelf, when coupled with an attached rider clause, "fixed" a sum certain for the support of their two minor children and was, therefore, neither deductible by Theodore nor includible in Sara's gross income.

Affirmed.

HARVEY M. SKLAVER, New York, N. Y., *for petitioners Theodore J. Gotthelf and Toby Gotthelf.*

RICHARD M. ROBERTS, Acting Assistant Attorney General, Washington, D. C. (Lee A. Jackson, C. Guy Tadlock, Marian Halley, Washington, D. C., attorneys, on the brief), *for Commissioner of Internal Revenue Service as petitioner and respondent.*

SEYMOUR REITKNEICHT, New York, N. Y., *for respondent Sara N. Gotthelf.*

MOORE, *Circuit Judge:*

Theodore and Toby Gotthelf appeal from a decision of the Tax Court entered on November 24, 1967, which found a deficiency in income tax due from them for the taxable year 1960 in the acount of $1,320.87. The question presented for review is whether the provisions of a separation agreement between Theodore and Sara Gotthelf, his former wife, "fixed" a certain amount of money exclusively for the support of their two minor children.

The pertinent facts were stipulated, and incorporated by reference into the Tax Court's findings of fact. Sara

and Theodore were married in 1951. They had two children, Nicole and Eric, born in 1955 and 1956, respectively. On March 28, 1958, they entered into a separation agreement. Divorce followed a week later and the separation agreement was incorporated by reference into the decree of divorce. The portion of that agreement important to this case reads as follows:

> 5 (a) In addition to the provisions heretofore made in Paragraph "4", the husband will hereafter pay to the wife, so long as she shall remain alive and does not remary, the sum of Twelve Thousand ($12,000.00) Dollars annually as and for her support and for the support, care (including, but not by way of limitation, medical care and expenses), maintenance and education of the children of the marriage. Payment of the aforesaid sum shall be made in equal monthly installments of One Thousand ($1,000.00) Dollars each on the 1st day of each month in advance. * * *
>
> (b) In the event that the parties become divorced and that the wife thereafter remarries, then the amount which the husband shall pay the wife for the purposes stated in 5 (a) of this agreement shall be reduced to the sum of Seven Thousand ($7,000.00) Dollars annually to be paid in equal installments, subject to the further provisions of paragraph 5 (c) of this agreement.
>
> (c) When either child reaches the age of twenty-one years, or in the event of the death or marriage of either child before he or she becomes twenty-one years of age, or in the event that either child is no longer living under the care and supervision of the mother (e.g., if either child is in the military

> forces), then the amount which the husband shall pay the wife shall be reduced by Thirty-Five Hundred ($3,500.00) Dollars on an annual basis for each child, so that when both children reach the age of twenty-one years, or have died or have married before they reach the age of twenty-one years, or are no longer living under the care and supervision of the mother (e.g., if in the military forces) (and in the event that the wife has not remarried), then the sole obligation of the husband will be to pay the wife the sum of Five Thousand ($5,000.00) Dollars annually, payable in equal monthly installments.

Equally important is the rider attached to the agreement:

> This agreement shall be binding on the Estate of the husband to the extent of the payment of Seven Thousand ($7,000.00) Dollars for the benefit of the two children, as in this agreement provided for.

In his income tax return for the year 1960 Theodore, filing jointly with his present wife Toby, claimed a deduction of $12,000 for "Alimony" paid by him to Sara for that year pursuant to the terms of the above agreement. The Commissioner determined, and Theodore thereafter conceded, that the amount actually paid to Sara was $11,400. In any event, the Commissioner found that $7,000 of this amount was for child support rather than for alimony and was, therefore, not deductible by Theodore under the provisions of the Internal Revenue Code of 1954 which allows a deduction for the amount of alimony paid to a divorced spouse (26 U.S.C. § 215(a)) even if used for purposes of child support (26 U. S. C. § 71(a)) unless the terms of the separation agreement "fix" the amount to be paid for child

support. Theodore contested this determination in the Tax Court proceeding below, contending that the entire $11,400 was deductible.

Sara's income tax return for 1960 included $4,400 as alimony received from Theodore. Following a determination by the Commissioner that the entire $11,400 paid to her that year was alimony and therefore includible in her gross income, she asked the Tax Court to find that $7,000 of the total was for child support and therefore not includible in her gross income under the provisions of 26 U. S. C. § 71(b).

The Tax Court, considering both of the Commissioner's determinations in a consolidated proceeding, held that the $7,000 was neither deductible by Theodore nor includible in Sara's gross income. In this appeal from that decision, Theodore contends that the agreement, even when coupled with the rider, did not "fix" an amount for the support of the minor children pursuant to § 71(b), which provides that a divorce wife need not include in gross income " . . . that part of any payment which the terms of the decree, instrument or agreement fix, in terms of an amount of money or a part of the payment, as a sum which is payable for the support of minor children of the husband."

Construing this statute in *Commissioner* v. *Lester*, 366 U. S. 299, 303 (1960), the Supreme Court said:

> "The agreement must expressly specify or 'fix' a sum certain or percentage of the payment for child support before any of the payment is excluded from the wife's income. The statutory requirement is strict and carefully worded. It does not say that 'a sufficiently clear purpose' on the part of the parties is sufficient to shift the tax. It says that the 'written instrument' must 'fix' that 'portion

"of the payment" which is to go to the support of the children. Otherwise, the wife must pay the tax on the whole payment."

As pointed out by the Tax Court, the plain implication of the agreement is that $7,000 was intended for the support, care and maintenance of the children and $5,000 for the support of Sara; in the event Sara would remarry, the aggregate annual payment would be reduced to $7,000; in the event that a child reaches the age of 21, marries, dies or is no longer living under the supervision of Sara's household, the aggregate payment would be reduced by $3,500; and in the event that Sara did not remarry and both children were no longer entitled to support because of the reasons just mentioned, Sara would receive $5,000.

The question, therefore, is whether the addition of the rider clause cures the ambiguity or defect. We agree with the conclusion of the Tax Court that it does. The language of the rider binding Theodore's estate to the extent of $7,000 "for the benefit of the two children *as in this agreement provided for*" makes specific that which would otherwise have been left for inference. The rider was executed on the same day as the original agreement and there can be no question that it refers back to Paragraph 5 of the agreement. Although clearer language in the agreement such as "$12,000 annually, consisting of $5,000 for her support and $7,000 for the support, care, maintenance and education of the children" would have been preferred, and would have saved the parties considerable litigation, the rider, in our opinion, achieves the same result.

The cases of this circuit cited by Theodore, all of which holds that the amount of money used for child support was not "fixed" in the agreement, are distinguishable and do not hinder our conclusion. In *Van Oss* v. *Commissioner*, 377 F. 2d 812, 814 (2d Cir. 1967), there was no provision in the agreement for the reduction of payments to the wife

if the children died or ceased to reside with their mother. Similarly, in *Weil* v. *Commissioner*, 240 F. 2d 584, 588 (2d Cir. 1957) and *Hirshon's Estate* v. *Commissioner*, 250 F. 2d 497 (2d Cir. 1957) (PER CURIAM)—both pre-*Lester* cases—payments to the wife were not to be reduced whenever a child left the household. In *Weil*, the agreement specifically provided that all payments to the wife might continue despite the children's death, majority or absence from the wife's household. In *Hirshon's* Estate the sums paid to the wife were available for her own use regardless of what the child did, so long as she, the wife, did not remarry.

The decision of the Tax Court is affirmed.

APPENDIX C

(Opinion of Tax Court of the United States)

48 T. C. No. 67

TAX COURT OF THE UNITED STATES

SARA NICOLL GOTTHELF,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

THEODORE J. GOTTHELF and TOBY GOTTHELF,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket Nos. 5921-65, 6269-65. Filed August 11, 1967.

Held, payments aggregating $7,000 a year (out of a larger total) by a husband to his divorced wife were for the support of their two minor children and were neither includible in her gross income nor deductible by him. An agreement providing for these payments contained a rider, which sufficiently "fixed" or specified such payments as child support so as to meet the requirements of *Commissioner* v. *Lester,* 366 U.S. 299, and to qualify as child support under section 71(b), I.R.C. 1954.

SEYMOUR REITKNECHT, for the petitioner in Dock No. 5921-65.

HARVEY L. GARDNER, for the petitioners in Docket No. 6269-65.

JAY HAMELBURG, for the respondent.

OPINION

RAUM, *Judge:* The Commissioner determined the following deficiencies in the income tax of petitioners for the year 1960:

Sara Nicoll Gotthelf	$2,092.37
Theodore J. and Toby Gotthelf ...	1,632.87

Appendix C—Opinion of Tax Court of the United States

The sole question for decision is whether $7,000 out of a total of $11,400 paid in 1960 by a divorced husband to his former wife, pursuant to a separation agreement, is deductible as alimony by the husband and includible in the income of the divorced wife under the provisions of section 71(a) and 215 of the 1954 Code, or whether the payment of that $7,000 represents child support under section 71(b), which is neither deductible by the husband nor includible in the income of the wife.[1]

---

[1] SEC. 71. ALIMONY AND SEPARATE MAINTENANCE PAYMENTS.

(a) General Rule.—

(1) Decree of Divorce or Separate Maintenance.—If a wife is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, the wife's gross income includes periodic pyaments (whether or not made at regular intervals) received after such decree in discharge of (or attributable to property transferred, in trust or otherwise, in dischage of) a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation.

(2) Written Separation Agreement.—If a wife is separated from her husband and there is a written separation agreement executed after the date of the enactment of this title, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such agreement is executed which are made under such agreement and because of the marital or family relationship (or which are attributable to property transferred, in trust or otherwise, under such agreement and because of such relationship). * * *

* * *

(b) Payments to Support Minor Children.—Subsection (a) shall not apply to that part of any payment which the terms of the decree, instrument, or agreement fix, in terms of an amount of money or a part of the payment, as a sum which is payable for the support of minor children of the husband. For purposes of the preceding sentence, if any payment is less than the amount

The pertinent facts have been stipulated, and, as stipulated, are incorporated herein by reference as our findings of fact.

Petitioner Sara Nicoll Gotthelf filed her Federal income tax return for 1960 with the district director of internal revenue, Manhattan District, New York. Petitioners Theodore J. Gotthelf and Toby Gotthelf filed their joint Federal income tax return for 1960 with the district director of internal revenue, Brooklyn, New York. All petitioners were residents of New York when the petitions herein were filed.

Sara and Theodore were married on July 20, 1951. They had two children, Nicole Patrice Gotthelf, born on July 28, 1955, and Eric Van Gotthelf, born on October 24, 1956. On March 28, 1958, Sara and Theodore entered into a separation agreement. They were divorced on April 3, 1958, and the separation agreement was incorporated in the decree of divorce by reference. The agreement provided in part as follows:

> 5 (a) In addition to the provisions heretofore made in Paragraph "4", the husband will hereafter pay to the wife, so long as she shall remain alive and does not remarry, the sum of TWELVE THOUSAND ($12,000.00) DOLLARS annually as and for her support and for the support, care (including, but not by way of limitation, medical care and expenses),

---

specified in the decree, instrument, or agreement, then so much of such payment as does not exceed the sum payable for support shall be considered a payment for such support.

SEC. 215. ALIMONY, ETC., PAYMENTS.

(a) General Rule.—In the case of a husband described in section 71, there shall be allowed as a deduction amounts includible under section 71 in the gross income of his wife, payment of which is made within the husband's taxable year. * * *

maintenance and education of the children of the marriage. Payment of the aforesaid sum shall be made in equal monthly installments of ONE THOUSAND ($1,000.00) DOLLARS each on the 1st day of each month in advance. * * *

(b) In the event that the parties become divorced, and that the wife thereafter remarries, then the amount which the husband shall pay the wife for the purposes stated in 5 (a) of this agreement shall be reduced to the sum of SEVEN THOUSAND ($7,000.00) DOLLARS annually, to be paid in equal monthly installments, subject to the further provisions of paragraph 5 (c) of this agreement.

(c) When either child reaches the age of twenty-one years, or in the event of the death or marriage of either child before he or she becomes twenty-one years of age, or in the event that either child is no longer living under tthe care and supervision of the mother (e.g., if either child is in the military forces), then the amount which the husband shall pay the wife shall be reduced by THIRTY FIVE HUNDRED ($3,500.00) DOLLARS on an annual basis for each child, so that when both children reach the age of twenty-one years, or have died or have married before they reach the age of twenty-one years, or are no longer living under the care and supervision of the mother (e.g., if in the military forces) (and in the event that the wife has not remarried), then the sole obligation of the husband will be to pay the wife the sum of FIVE THOUSAND DOLLARS ($5,000.00) annually, payable in equal monthly installments.

A rider attached to the agreement reads as follows:

> This agreement shall be binding on the Estate of the husband to the extent of the payment of SEVEN THOUSAND ($7,000.00) DOLLARS for the benefit of the two children, as in this agreement provided for.

The agreement, dated March 28, 1958, consisted of eight numbered pages signed on page 8 by Theodore and Sara, followed by the rider on a separate page numbered 8-A, also signed by Theodore and Sara, followed in turn by an unnumbered page in which the signatures of Theodore and Sara on the "foregoing instrument" were notarized. The signatures of both parties were thus notarized on March 28, 1958. The sheet containing the notarizations was in turn followed by two unnumbered sheets containing two exhibits. The eight numbered sheets, the rider on page 8-A, the notarization sheet and the two exhibits were all bound together in the foregoing sequence.

In the income tax return filed by Theodore and Toby Gotthelf for the year 1960 they claimed a deduction of $12,000 for "Alimony" paid by Theodore to Sara during that year pursuant to the separation agreement. The Commissioner determined that the payments to Sara amounted to $11,400 and that $7,000 of this amount was for child support and was not deductible by Theodore and Toby Gotthelf under the provisions of sections 71 and 215. In their petition Theodore and Toby concede that the payments made to Sara in 1960 amounted to $11,400. They contend that this amount is deductible by them as alimony.

In the income tax return filed by Sara for the year 1960 she included $4,400 in her income as alimony received from Theodore. The Commissioner determined that the entire $11,400 received by her from Theodore during that year constituted alimony which was includible in her gross

income. She contends that $7,000 of this amount was for child support and was, therefore, not includible in her gross income under the provisions of section 71(b).

We are satisfied that, in the absence of the rider on page 8-A, the $7,000 payment would not qualify as child support under section 71(b), in accordance with *Commissioner* v. *Lester*, 366 U.S. 299. Cf. *Van Oss* v. *Commissioner*, — F. 2d — (C.A. 2). True, the plain implication of paragraph 5(a), (b), and (c) of the agreement is that such payment was intended as child support. Thus, $12,000 a year is to be paid annually to the wife for her support as well as "for the support, care * * *, maintenance and education" of the two children; but, in the event of the wife's remarriage, the aggregate annual payment is to be reduced to $7,000; and, in the event that a child reaches the age of 21, or dies or marries, or is no longer living under the care and supervision of the mother, the annual amount payable by the husband to the wife is to be reduced by $3,500. Here, then, is a clear indication that the parties to the agreement intended the $12,000 to be composed of $5,000 for the support of the wife and $7,000 for the support of the two children. But, under *Lester*, we are not permitted to indulge in any such interpretation of the agreement. Section 71(b) provides that the agreement must "fix, in terms of an amount of money or a part of the payment" the sum which is claimed to represent child support, and *Lester* holds that these provisions must be applied literally. It is not enough that there be "a sufficiently clear purpose" as to the amount or portion allocable to child support; the decree or written instrument incident to the divorce must "specifically designate" or "fix" the amount or portion which is to be applied to the support of the children. 366 U.S. at pp. 303, 305.

Does the addition of the rider on page 8-A cure the defect? We think it does. Although crudely drafted, the

rider does supply the specificity otherwise missing in paragraph 5. It removes any possible doubt that $7,000 represents child support. Paragraph 5(a) designates $12,000 for the wife's support "and for the support, care * * *, maintenance and education of the children", but it does not state in specific terms what portion of that aggregate amount is thus to be devoted for the children's benefit. Although the parties understood what portion was to be thus devoted, as revealed by subparagraphs (b) and (c), the amount allocable to the children was specifically set forth in the rider as $7,000.

To be sure, the purpose of the rider appears to have been to make certain that the $7,000 obligation in respect of the children would be binding on the father's estate in the event of his death. But it specified, beyond all ambiguity, that the amount "for the benefit of the two children, as in this agreement provided for", i.e., for their "support, care * * *, maintenance and education" was $7,000. It made specific that which would have been left to inference in its absence, and thus supplied what was lacking in *Lester*.

Certainly, if the pertinent language of paragraph 5(a) had read "$12,000 annually, consisting of $5,000 for her support and $7,000 for the support, care * * *, maintenance and education of the children," there could be no dispute that the $7,000 would qualify as child support under section 71(b). We think that the rider achieves precisely this result. Although ineptly drawn, it does specify $7,000 as the amount "payable for the benefit of the two children"; that language in turn is modified by the words "as in this agreement provided for," and those words in turn are referable only to the provisions of paragraph 5. Thus, the provisions for child support in paragraph 5 are equated in the rider to the words "for the benefit of the two children," and the amount thereof is specifically fixed at

$7,000. The rider itself was executed as part of the original agreement on the same day, March 28, 1958, and the $7,000 figure therein is just as much a part of that agreement as though it had appeared in paragraph 5. It is a matter of no consequence that the rider was intended to spell out an obligation after the father's death, for, in the course of so doing, it also amplified the language of paragraph 5 so as to nail down the amount payable for the support of the children. In the circumstances, we conclude that the agreement did "fix, in terms of an amount of money" the sum payable for the support of the two children, as required by section 71(b).

We reach this conclusion without reliance upon any of the evidence presented by the wife showing that the subsequent conduct of the parties themselves, the positions urged by them in subsequent litigation, and the judicial action taken in such subsequent litigation, were all upon the basis that $7,000 represented child support. That evidence, under *Lester* and section 71(b), was irrelevant, since the amount allocable to child support must appear explicitly in the instrument itself; however, it is interesting to note that such evidence in fact confirms the result that we reach.

Decision will be entered under Rule 50.

APPENDIX D

(Judgment of the United States Court of Appeals for the Second Circuit)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of January, one thousand nine hundred and sixty-nine.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
Circuit Judges,

HON. DUDLEY B. BONSAL,
District Judge.

THEODORE J. GOTTHELF and TOBY GOTTHELF,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

APPEAL FROM THE TAX COURT OF THE UNITED STATES

This cause came on to be heard on the transcript of record from The Tax Court of the United States , and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed,

.....
Clerk

APPENDIX E

(Order Extending Time to File Petition for Rehearing)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

32363, 32364-5

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 4th day of March, one thousand nine hundred and sixty-nine.

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

SARA NICOLL GOTTHELF,

Respondent.

THEODORE J. GOTTHELF and TOBY GOTTHELF,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

(and another case).

It is hereby ordered that the motion by counsel for the petitioner for leave to file a petition for rehearing on or before February 27, 1969, having been granted, it is further ordered that the time is hereby extended to Friday, March 7, 1969.

LEONARD P. MOORE
Leonard P. Moore, *USCJ*

DUDLEY D. BONSAL
Dudley D. Bonsal, *USDJ*

March 4, 1969

APPENDIX F

(Order Denying Petition for Rehearing)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

32363-5

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

SARA NICOLL GOTTHELF,

Respondent.

THEODORE J. GOTTHELF and TOBY GOTTHELF,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

(and another case).

A petition for a rehearing having been filed herein by counsel for petitioners Theodore J. Gotthelf and Toby Gotthelf.

Upon consideration thereof, it is Ordered that said petition be and it hereby is

DENIED.

/s/ STERRY R. WATERMAN
Sterry R. Waterman, *USCJ*

/s/ LEONARD P. MOORE
Leonard P. Moore, *USCJ*

/s/ DUDLEY B. BONSAL
Dudley B. Bonsal, *USDJ*

March 13, 1969